In the United States Circuit Court of Appeals for the Ninth Circuit

A. E. ANDERSON,
Plaintiff in Error,

vs.

THAD B. PRESTON,
Defendant in Error.

No. 4484

Brief of Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

JOHN C. HOGAN,
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STATEMENT OF THE CASE.

Plaintiff in error brought this action in the district court to recover the sum of $9,279.90, claimed by him to be due to him from the defendant in error, as a commission under an alleged executory contract, whereby the defendant employed the plaintiff as broker to sell defendant's land. The district

court sustained a demurrer to the amended complaint. The plaintiff refused to plead further and judgment of dismissal of the action was entered by the district court. It is here sought to review the action of the district court in sustaining the demurrer to the amended complaint and dismissing the action.

The district judge sustained the demurrer to the amended complaint upon several grounds, namely:

1. That there was no contract of employment between plaintiff and defendant, and that the several letters passing between the plaintiff and the defendant and which alone comprised the purported contract were insufficient to constitute a contract between the parties and were in the nature only of preliminary negotiations.

2. That the amended complaint did not state a cause of action, because its allegation as to performance, by the plaintiff, of the alleged contract was insufficient to show performance.

3. That, in any event, the purported contract between the parties as alleged in the amended complaint, was void under the statute of frauds of the state of Washington.

In this brief these three points will be discussed in the order named.

ARGUMENT AND AUTHORITIES.

I.

The district court correctly ruled that the letters, which alone comprised the purported contract between the parties, constituted preliminary negotiations only, and did not amount to a binding contract between the parties.

The plaintiff in the court below, A. E. Anderson, was a real estate broker residing at Tacoma, Wash. The defendant, Thad B. Preston, resided in Ionia, Michigan. The defendant and his associates owned timber lands in the state of Washington, in both Kitsap County and Pierce County in that state.

The purported contract between the parties consisted solely of three letters passing between them. These letters were set out in full in the amended complaint which alleged that the entire contract between the parties was embodied in these letters. The first was a letter written by Preston to Anderson on January 15th, 1923, and the second was a letter written by Anderson to Preston on January 20th, 1923, and the third and final letter was one written by Preston to Anderson on January 25th, 1923. No sale of the timber land was ever made.

The following are copies of the three letters which it is claimed by the plaintiff in error, constituted a binding contract between the parties, to-wit:

"Ionia, Michigan, 1-15-23.

"Dear Mr. Anderson:

"We have a tract in township 22-1 West, that I think is very desirable timber. The price of this is three dollars ($3) per thousand. If you would be at all interested, kindly let me know.

Yours truly,

(Signed) T. B. PRESTON."

"Tacoma, Washington, 1-20-23.

"Dear Mr. Preston:

"In regard to the tract in 22-1 West, if you will give me the minutes of same (Township Platt or Section platt with parcels marked off) so that their would be no mistake made in descriptions, I will put it up to this party, as he is anxious for a logging chance.

"I would like very much to have your terms on this tract, so that I may be able to talk to him intelligently on the condition of sale, and I presume that you pay commission out of the $3.00 per M.

"Thanking you in advance for this information, I am,

Yours truly,

(Signed) A. E. ANDERSON."

"Ionia, Michigan, 1-25-23.

"Dear Mr. Anderson:

"Yours of the 20th inst.

"I am enclosing plat of the lands in 22-1 and that was the basis of our purchase of these lands.

"On sale of the lands at $3 per thousand there would be a 5% commission going to you. I presume terms could be made that would meet the views of a substantial purchaser.

Yours truly,

(Signed) T. B. PRESTON."

After reading these letters and studying them carefully, one is irresistibly driven to the conclusion that the letters constituted merely preliminary negotiations between the parties, and were not intended to be a completed contract, because (a) the "terms" of sale were not settled, and (b) there was no acceptance by Anderson.

(a) In the first letter Preston merely informed Anderson that he had a tract of land in Township 22-1 West, which he thought was desirable timber and on which the price was $3, and asked Anderson if he would be interested. To this letter Anderson replied, simply asking for the township plat of the land, and adding: "I would very much like to know your *terms* on this tract * * and I presume that you pay commission out of the $3, per M." Preston thereupon wrote the final letter to Anderson, enclosing a plat and saying that on sale of the land at $3 per M, "there would be a 5% commission going to you," then adding, "I presume terms could be made that would meet the views of a substantial purchaser," thus showing conclusively that matters had not yet advanced beyond the stage of negotiations, but the negotiations ended there, and never did ripen into a contract, for Anderson never replied to Preston's letter. Anderson had asked Pres-

ton for the terms of sale and Preston merely replied that he "presumed terms could be made that would meet the views of a substantial purchaser." This left the terms of sale wholly unsettled. Preston's expression, "I presume terms could be made that would meet the views of a substantial purchaser," could not be construed otherwise than as an invitation from Preston requesting Anderson to propose terms such as he thought would be acceptable to a buyer that Anderson then had in view, but Anderson never replied. Preston's letter did not fix, nor purport to fix the terms of sale, and that was an essential and vital matter to be settled, and one which if the parties did not settle in their contract, the court could not settle for them. It is true that in the amended complaint, Anderson alleged that he found a purchaser willing to buy "upon such terms as the said defendant *might* require, to-wit: terms that would meet the views of a substantial purchaser," (See paragraph IV, amended complaint, T 7), but no sale was ever made. If we imagine the plaintiff at the trial, as trying to prove this allegation of the amended complaint, the absurdity of the situation is at once apparent, because the purchaser which Anderson found, might have one idea as to what the terms should be that would meet the views of a substantial purchaser, and Preston might have a very different

view of what such terms ought to be, leaving it to the court to make terms between the parties, in short, to make a contract between the parties, which the court would be without power to do. It is plain that until the parties had settled upon this important feature of the contract, governing the terms of sale, the contract was incomplete, and up to that stage, constituted merely preliminary negotiations between them, which never did enter into a contract.

It is elementary that if an offer, in any case, is so indefinite as to make it impossible for the court to fix exactly the legal liability of the parties, its acceptance cannot result in an enforcible agreement.

Where the negotiation of the contract is carried on by correspondence between the parties residing at different places, whether by letters, or telegrams, or both, the courts have occasion frequently to consider the question as to whether the transactions had, as reflected by the letters or telegrams, advanced to a stage sufficient to constitute a contract or were merely preliminary negotiations. On this point we call attention to the case of *Strobridge Lithographing Co. vs. Randall*, 73 Fed. 619, decided by circuit court of appeals of the sixth circuit. The opinion by Judge Taft and concurred in by Judge Lurton, two distinguished jurists. The syllabus in that case reads as follows:

"The S. Co. was a creditor of the firm of B. & D., and had commenced an action against the members of the existing firm, together with one R., who had recently retired from it, and who alone had been served in the action. Pending this action, negotiations were begun between the S. Co. and B. & D. for a settlement of the S. Co.'s claims, in the court of which an arrangement was made by which it was thought that, if B. & D. could get certain notes of their own, held by R., they could raise money to effect a settlement. Thereupon S., the president of the S. Co., telegraphed from New York to R., in Michigan; 'Will you turn over to us the notes amounting to $4,000 you hold of B. & D.? If so, will release the parties to the suit against B. & D., and they will get you released from all other indebtedness of the firm;' to which R. replied: 'Certainly . . . Will get them, and turn them over to you on condition of your telegram.' The settlement was never in fact made. Held, that such telegrams were merely intended by the parties as negotiations for an agreement, and did not constitute a completed contract by S. or the S. Co. and R., by which the latter was released from his obligations, as a member of the firm of B. & D., to the S. Co."

Judge Taft, in his opinion said:

"The first question that meets us in this case is whether the two telegrams between Strobridge and Randall made a contract of release. If they did not, then the judgment of the court below must be reversed, without regard to the other questions made here, of accord and satisfaction, and of Strobridge's authority to bind his company by the alleged contract of release. Mr. Justice Foster, of the supreme judicial court of

Massachusetts, speaking for that court in *Lyman vs. Robinson*, 14 Allen, 242, 254, said:

> 'A valid contract may doubtless be made by correspondence, but care should always be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation.'

"In *Ridgway v. Wharton*, 6 H. L. Cas. 238, Lord Wensleydale said:

> 'An agreement to be finally settled must comprise all the terms which the parties intend to introduce into the agreement. An agreement to enter into an agreement upon terms to be afterwards settled between the parties is a contradiction in terms.'

"In *Rossiter v. Miller*, 5 Ch. Div. 648, 659, Lord Justice James said:

> 'On a question of construction different minds may differ, but, for my own part, I have often felt that in cases of this nature parties have found themselves entrapped into contracts which they wrote without the slightest idea that they were contracting.'

"—And the same learned judge used similar language in *Smith v. Webster*, 3 Ch. Div. 56.

> "Whether correspondence with the purpose of entering into a contract is merely preliminary negotiation or the contract itself must be determined by the language used and the circumstances known to both parties under which the communications in writing were had. If it is plain from the language used that *some term which either party desires to be in the contract is not included or definitely expressed in the cor-*

respondence relied upon, no contract is made."
Lithographing Co. vs. Randall, 73 Fed. 719.

"A contract by correspondence is not complete until the communications have passed beyond the state of preliminary negotiations. The minds of the parties must have met, and it must appear that at some point in the correspondence there was a definite proposal by one party which was unconditionally accepted by the other."
13 C. J. 299.

Bowen vs. Hart, 101 Fed. 376.

In the case of *Stag vs. Compton*, 81 Ind. 171, there had been some negotiations concerning the purchase of a horse, and the defendant wrote to the plaintiff saying: "I might purchase your horse at $200, the price you ask. I would like to get it at once if it will do me, which I am quite sure it will." This message was sent in reply to a letter from the plaintiff stating the price of the horse. The court said that even if the plaintiff had replied directing the defendant to take the horse at the price named, and telling him when and how to get it, there still would have been no completed contract because even then, by the terms of this communication, the defendant was entitled to determine whether the horse would suit him.

So, in this case, even if Anderson had replied to Preston, unconditionally accepting the suggestion

made in Preston's last letter, still there would be no contract because the terms to be made to the purchaser, such as time of payment, security to be given and the like, were left open and had still to be arranged.

In *Knight vs. Cooley*, 84 Iowa, 218, in reply to a letter requesting the price of certain lots, the defendant wrote: "Yours received; the lots are so encumbered that it would be difficult to make title. Price is $1700, and $1500, net and cheap." Plaintiff replied accepting the offer and sent a draft in part payment, which the defendant returned. The court held that there was no contract and regarded the correspondence as amounting simply to negotiations and not to a binding offer.

In *Martin vs. Northwestern Fuel Company*, 22 Fed. 596, in reply to a proposition made by the plaintiff by telegraph, to sell coal at a certain figure, the following telegram was sent: "Telegram received. You can consider the coal sold. Will be in Cleveland next and arrange particulars." Judge Brewer, who decided the case, held that the telegram was merely an acknowledgment that the contract might be easily agreed upon but that the correspondence did not amount to a contract.

(b) Furthermore, Anderson never accepted

even the incomplete proposal contained in Preston's last letter. Anderson never replied to Preston's letter, never accepted the employment and never in any way bound himself by any expression whatever. Even if Preston's offer contained in his last letter had been so complete in itself as to form a proper basis for a contract if accepted, yet if Anderson never accepted it or signified an acceptance of it, there was no contract between the parties. A contract must be mutual and therefore, when a contract is made by correspondence, the offer made by one party must be accepted by the other so as to give mutuality to the contract and until this is done it is not complete and there can be no contract.

Anderson promised nothing, was not bound in any way. He assumed no responsibility. In the face of Preston's last letter, which was more in the nature of an inquiry than an offer, Anderson remained absolutely silent; he made no response at all to Preston. Even if Preston's letter had been sufficiently definite to be considered as an offer, there was never an acceptance of the offer by Anderson and without an acceptance or some commitment on the part of Anderson communicated to Preston, there could be no contract in any event.

"Before an offer can become a binding promise and result in a contract it must be accepted, either by word or act, for without this there cannot be an agreement. Nor is a promise binding on its maker unless the promisee has assented to it."
13 C. J. 272.

II.

The amended complaint failed to show performance of the alleged contract, on the part of the plaintiff, and for that reason, it did not state a cause of action, and the demurrer was properly sustained for this reason also.

It must be borne in mind that the purported contract, between these parties, always remained executory and never became an executed contract. No sale was ever made under it.

The amended complaint alleged in paragraph IV, that on June 16th, 1923, six months after the exchange of the letters, Anderson procured a "substantial purchaser" and that on November 1st, 1923, eleven months after the exchange of the letters, this "substantial purchaser" was refused permission by the defendant, to proceed with the purchase of the property. No excuse was shown in the amended complaint for the delay on the part of Anderson; even if the letters did amount to a contract, at best the allegation of the amended complaint, merely

showed that eleven months after the purported contract was made, the plaintiff tendered performance, but that the defendant refused at that time to perform on his part. The district court was right in holding that, as a matter of law, this tender came too late in the absence of any allegation of excuse or explanation for the delay.

> "What is a reasonable time within which an act is to be performed, when a contract is silent on the subject, is a question of law, and must depend upon the situation of the parties, and the subject matter of the contract."
> 6 R. C. L. 896.

III.

The district court sustained the demurrer to the amended complaint on the further ground that, in any event, the contract was void under the statute of frauds of the state of Washington, Section 5825, Remington's Compiled Statutes of Washington, which reads as follows:

> "Sec. 5825—In the following cases specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract and promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: (5) an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission."

The supreme court of the state of Washington, in construing and applying this statute, has laid down the rule that in order to satisfy the statute, the contract must be *completely* in writing, and if anything is left to be supplied by parol evidence, then the contract is insufficient. On this point, in the case of *Ingleson* vs. *Port Crescent Shingle Co.* 74 Wash., 424, the supreme court stated the rule in the following language:—

> "These cases lay down the rule that a writing sufficient to satisfy the statute must be coextensive with the stipulations of the parties; that is to say, it must express the *entire* contract *and leave nothing that pertains to the essentials of the contract to be supplied by parol.*"

Again in *Keith vs. Smith*, 46 Wash. 131, the state court, construing this statute, said:—

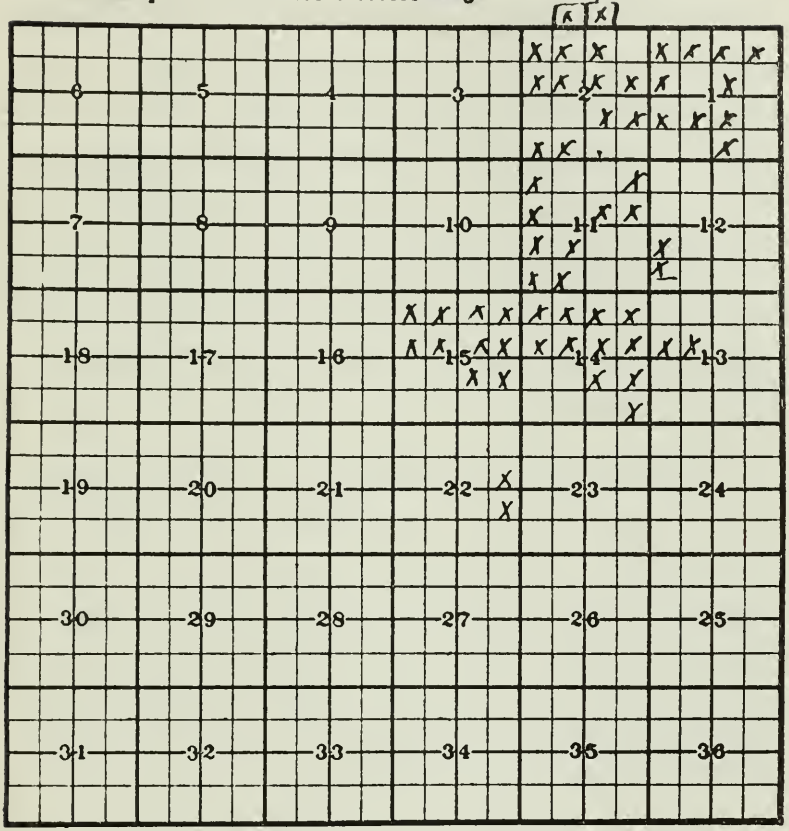
> "A contract partly written and partly verbal is a parol contract, and contracts required by law to be in writing must be wholly written to be enforceable. . . . *A material part of the contract in suit being verbal, it must be held to be an oral contract, and therefore invalid.*"

In fact, the plaintiff in error, in the case at bar, considers on pages 6 and 7, of his brief, that the entire contract between the parties, in order to satisfy the statute, must be in writing, leaving nothing to be supplied by parol evidence.

Examining the correspondence which it is claimed constituted a contract in this case, and applying to the strict rule laid down by the Washington Court, it is apparent that the correspondence is deficient in two important particulars; first as to the description of the property, and, secondly, as to the terms of sale. We will discuss these two points in the order mentioned.

1. The description of the property as disclosed by the correspondence, was insufficient to satisfy the statute and it would have been necessary to resort to parol evidence to supply the deficiency, a thing which is not permitted under the statute. The letters themselves, did not purport to describe the property, but it is contended by the plaintiff in error that the plat which Preston enclosed in his last letter to Anderson, contained a sufficient description of the property. The following is a photographic copy of that plat:

Township 22 North ..... Range 1 West, W. M.



N½	-	Sec. 1	--	3153,000
SW	-	NW - 1	&	
NW	-	SW - 1	--	1130,000
NE	-	SW - 1	--	990,000
SW	-	NE - 1	--	876,000
NW	-	SE - 1	--	983,000
SW	-	SE - 1	--	860,000
NW	-	- 2	--	3240,000
S½	-	SW - 2	--	3230,000
NW	-	NE - 2	--	940,000
S½	-	NE - 2	--	1443,000
N½	-	SE - 2	--	1771,000
NE	-	NE -11	&	
S½	-	NE -11	--	3600,000
W½	-	NW -11	--	3445,000
SW	-	-11	--	4790,000

60 A.		Sec. 12	--	1380,000
S½	-	NW - 13	--	2088,000
NW¼		- 14	--	4540,000
NE¼		- 14	--	3738,000
N½	-	SE - 14	--	2160,000
SE	-	SE - 14	--	380,000
NW¼		15	--	4276,000
NE¼		- 15	--	5805,000
N½	-	SE - 15	--	2260,000
SE	-	NE - 22	&	
NE	-	SE - 22	--	2568,000
80 A.		- 35	--	2220,000

(61,866,000)

The district court held that this description was inadequate, under the statute, in two particulars, which we will now call attention to. It will be noticed that the last item reads, "80 A-35." This is supposed to mean eighty acres of land in section 35, but no land whatever, is marked or checked in section 35, on the accompanying plat, and there would be absolutely no way of telling what eighty acres in section 35, was intended, without resort being had to parol evidence.

The second item of deficiency in the description, is the item reading, "60 A—Sec. 12." This, it is claimed, is a description of sixty acres of land in section 12, and looking at section 12, on the plat, we do find certain land marked, but the particular sixty acres could not be picked out from the marking without a resort to parol evidence.

There are other matters which the district court thought rendered the description inadequate under the statute, but the two mentioned are the most flagrant ones.

In the case of *Thompson vs. English*, 76 Wash. 23, the court held a description in real estate broker's contract, as insufficient, where it described the land as "seventy-nine acres in section 30, township

2 N., Range 3, E. W. M., Clarke Co., Wn. Owner, A. E. English." In its opinion the court said:

> "The description of the property as contained in the contract was, 'Seventy-nine acres in section 30, township 2 N., Range 3, E. W. M., Clarke Co., Wn. Owner, A. E. English.' It will be observed that this decription does not specify which 79 acres in section 30 was intended. To ascertain this fact, resort must be had to oral testimony. The description given cannot be applied to any definite property. This question has recently been before the court in the case of Cushing v. Monarch Timber Co., 75 Wash. 678, 135 Pac. 660. In that case, after reviewing the previous decisions, speaking of the description, it is said:
>
> 'The description being essential, it follows that it must be such a description as would meet the requirements of a sufficient description under any other phase of the statute of frauds, as, for instance, when invoked in actions for specific performance. It must be a description, complete within itself, by which the realty to be sold can be known and identified.' "
>
> *Thompson vs. English*, 76 Wash. 23.

On the question of sufficiency of description in such contract, all of the previous decisions of the state court were reviewed at length in *Rogers* vs. *Lippy*, 99 Wash. 312. In that case the court held insufficient this description: "my stock ranch located in sections 9, 17, and 21, township 3, south, range 13, east, Sweetgrass County, Montana." In its opinion the court said:

"It will be noticed that the description there involved was limited to land in one named section, while this description is even more general, being limited to land in three named sections. It was accompanied by the name of the owner, as this description is.

"In the late case of *Gilman v. Brunton*, 94 Wash. 1, 161 Pac. 835, there was involved the following description which was challenged as not being sufficient to support specific performance.

'Whereas, W. B. Brunton and Opal M. Brunton, parties of the first part, are the owners in fee simple of the following bounded and described property, situated in the county of Clarke, State of Washington, 48 acres, more or less, bounded on the North by Cedar Creek and situated about one mile east of Etna, Wash., said property being the same property conveyed to the party of the first part by W. Tate and wife in 1912.'

"This description not only has the owners' names in connection therewith, but a reference therein to the property as being the same as that conveyed by named parties to named parties in a certain year. Yet it was held insufficient upon the authority of *Thompson v. English*, supra. We think the manner of mentioning the owners' name in connection with or, as we might say, as a part of the description in Thompson v. English and *Gilman v. Brunton*, means in substance the same as the words 'my stock-ranch' in the description here in question, and furnished as much aid to the description in those cases as does the manner of designating the owner of the property in connection with this description."

Rogers vs. Lippy, 99 Wash. 312

2. As to the second point, namely, that the statement in the letter of Preston, "I presume terms could be made that would meet the views of a substantial purchaser," even if not objectionable for indefiniteness and incompleteness, would still be objectionable under the statute of frauds above quoted because in any event, it would require parol evidence to show what "terms that would meet the views of a substantial purchaser," ought to be. In fact, the allegation of the amended complaint, to the effect that plaintiff proceeded under the contract to procure "a substantial purchaser" to buy all of said timber lands at a price quoted the plaintiff by the defendant, to-wit: $3, per M feet, and thereupon such terms as the said defendant might require, to-wit: "terms that would meet the views of a substantial purchaser," clearly contemplated the introduction of parol evidence to show what such "terms" ought to be. This would render the contract objectionable under the statute.

We respectfully submit that the district court was correct in sustaining the demurrer and the judgment of the trial court should be affirmed.

If, however, this court should reverse the district court, then the cause should be remanded with permission to the defendant in error, to answer the

amended complaint and to join issue thereon, the cause then to proceed to trial on the issues so joined.

Respectfully submitted:

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Attorney for Defendant in Error.